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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN ANDREW CAREY,

Defendant and Appellant.

C051350

(Super. Ct. No.  
02F3353)

Defendant Steven Andrew Carey entered a negotiated plea of guilty to transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and admitted a prior drug conviction (Health & Saf. Code, § 11370.2) in exchange for dismissal of the remaining count [possession of methamphetamine for sale] and allegations [another prior drug conviction and two prior prison terms] and a stipulated state prison sentence of seven years.

The trial court sentenced defendant to state prison accordingly, that is, the upper term of four years for the

offense plus three years for the enhancement. The court also imposed various fines and fees, including a \$157.50 criminal laboratory analysis fee (lab fee) (Health & Saf. Code, § 11372.5) and a \$20 court security fee (Pen. Code, § 1465.8, subd. (a)(1)).

Defendant appeals. He contends (1) the \$20 court security fee violates the prohibition against retroactive and ex post facto application of statutes, (2) the lab fee must be reduced from \$157.50 to \$135, and (3) the trial court failed to record the lab fee and to itemize the fines, fees, and assessments separately on the abstract of judgment. We reject defendant's challenge to the security fee and will remand for an itemization of the fees, fines, and assessments.

#### **FACTS**

Defendant was charged by complaint with possession of methamphetamine for sale on March 3, 2002. The complaint also alleged a prior drug conviction and two prior prison terms. A codefendant was charged with possession of methamphetamine, possession of methamphetamine for sale, and possession of marijuana, a misdemeanor.

In a declaration filed in support of a motion to file the second amended information to add a charge of transportation of methamphetamine to the already existing charge of possession of methamphetamine for sale, the district attorney declared that a videotape "associated with this case" recorded defendant selling a white substance to a woman who got into defendant's car. The

woman then put the white substance into her pants, zipped up her pants, put her seat belt on, and defendant drove away.

Although the videotape associated with the possession for sale on March 3, 2002, also documented transportation of methamphetamine, the amended information alleged the transportation occurred on November 1, 2002. No one noted the discrepancy.

Defendant thereafter waived a preliminary hearing as well as a probation report. At the entry of plea hearing on August 12, 2005, the parties stipulated that the factual basis for the plea "may be found in Shasta County Sheriff's Department report 026256." The record on appeal does not include the sheriff's report. Defendant entered a plea of guilty to transportation of methamphetamine "[o]n or about the 1st day of November, 2002" as alleged in count 2 of the second amended information.

On appeal, defense appellate counsel claims the date of the transportation offense was March 3, 2002, while the Attorney General claims the date of the transportation offense was November 1, 2002. The discrepancy is relevant for purposes of our discussion.

## **DISCUSSION**

### **I**

In sentencing defendant to state prison, the trial court imposed a \$20 court security fee pursuant to Penal Code section 1465.8, subdivision (a)(1).

Penal Code section 1465.8 provides: "(a)(1) To ensure and maintain adequate funding for court security, a fee of twenty dollars (\$20) shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. [¶]

(2) For the purposes of this section, 'conviction' includes the dismissal of a traffic violation on the condition that the defendant attend a court-ordered traffic violator school, as authorized by Sections 41501 and 42005 of the Vehicle Code. This security fee shall be deposited in accordance with subdivision (d), and may not be included with the fee calculated and distributed pursuant to Section 42007 of the Vehicle Code. [¶]

(b) This fee shall be in addition to the state penalty assessed pursuant to Section 1464 and may not be included in the base fine to calculate the state penalty assessment as specified in subdivision (a) of Section 1464. [¶]

(c) When bail is deposited for an offense to which this section applies, and for which a court appearance is not necessary, the person making the deposit shall also deposit a sufficient amount to include the fee prescribed by this section. [¶]

(d) Notwithstanding any other provision of law, the fees collected pursuant to subdivision (a) shall all be deposited in a special account in the county treasury and transmitted therefrom monthly to the Controller for deposit in the Trial Court Trust Fund. [¶]

(e) The Judicial Council shall provide for the administration of this section."

*People v. Wallace* (2004) 120 Cal.App.4th 867 (*Wallace*) held that the court security fee can be imposed on a defendant whose crime was committed prior to the statute's operative date of August 17, 2003, concluding that the fee is for the nonpunitive purpose of ensuring and maintaining adequate funding for court security, is designated a fee rather than a fine and is not punitive in purpose or effect since it is a small amount, does not promote the traditional aims of punishment, and has a rational relationship to a nonpunitive purpose. (*Id.* at pp. 870, 873, 874-878.) *Wallace* found that the fee was "primarily . . . a budget measure." (*Id.* at p. 873.) *Wallace* noted that the same fee is imposed on civil and probate litigants, certain offenders whose charges are dismissed, and certain arrestees who are never charged with a crime, and that the fee would take effect only if certain trial court funding appropriations were approved.<sup>1</sup> (*Id.* at pp. 875-876.)

*Wallace* did not discuss Penal Code section 3.

Penal Code section 3 provides: "No part of [the Penal Code] is retroactive, unless expressly so declared." Case law interprets section 3 to mean either an express declaration or a

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<sup>1</sup> Government Code section 69926.5, authorizing a court security fee in civil and probate matters, has since been repealed. (Stats. 2005, ch. 75, § 115, operative Jan. 1, 2006.)

clear and compelling implication of a legislative intent.

(*People v. Hayes* (1989) 49 Cal.3d 1260, 1274.)

Penal Code section 1465.8 was operative on August 17, 2003. (Stats. 2003, ch. 159, §§ 25, 27, eff. Aug. 2, 2003, operative Aug. 17, 2003.) Section 1465.8 does not expressly state whether it is retroactive. Defendant's offense occurred on either March 3, 2002, or November 1, 2002, long before the operative date of the statute. Defendant entered his plea on August 12, 2005, almost two years after the operative date of the statute.

Relying on *People v. Carmichael* (2006) 135 Cal.App.4th 937 (*Carmichael*), defendant contends the court improperly imposed the \$20 court security fee, arguing that his offense occurred prior to the enactment of the statute. *Carmichael* held that the court security fee could not be retroactively imposed on offenses committed prior to the statute's effective date because "[t]he language of [Penal Code] section 1465.8, imposing a fee 'on every conviction for a criminal offense,' falls far short of 'a clear and compelling' indication the Legislature intended the statute to be applied retroactively, as required." (*Carmichael, supra*, 135 Cal.App.4th at p. 942.)

*People v. Alford* (2006) 137 Cal.App.4th 612 (*Alford*) concluded otherwise, examining the history and objective of the legislation (*id.* at pp. 625-626) and concluding the language of the statute, "'on every conviction for a criminal offense,' is indicative of a legislative intent to implement the statute immediately to apply to all pending cases." (*Id.* at p. 625.)

The Supreme Court has granted review in these two cases. (*Carmichael, supra*, 135 Cal.App.4th 937, review granted May 10, 2006, S141415; *Alford, supra*, 137 Cal.App.4th 612, review granted May 10, 2006, S142508.)

*Wallace's* conclusion that the court security fee is not punitive supports the conclusion that Penal Code section 3 has no application. Defendant criticizes *Wallace* but recognizes that this court has followed *Wallace* in *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866 (*Schoeb*). We agree with *Wallace* and *Schoeb* that the \$20 court security fee does not violate the ex post facto clauses of the state and federal Constitutions. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) Accordingly, we agree that a court security fee may be imposed with respect to defendant's offense, which was committed before but whose conviction occurred after the effective date of Penal Code section 1465.8.

## II

The trial court imposed a lab fee of \$157.50 but did not explain how the amount was calculated. Defendant contends that the fine was miscalculated and must be reduced to \$135, that is, a \$50 fee (Health & Saf. Code, § 11372.5, subd. (a)), a \$50 state penalty assessment (Pen. Code, § 1464, subd. (a)), and a \$35 county penalty assessment (Gov. Code, § 76000, subd. (a)). If the trial court imposed a 20 percent surcharge on the base fine (Pen. Code, § 1465.7, eff. Sept. 30, 2002), a state court facilities construction penalty (Gov. Code, § 70372, eff. Jan. 1, 2003), or a DNA identification fund penalty (Gov. Code,

§ 76104.6, eff. Nov. 3, 2004), defendant argues imposition of such penalties would be unauthorized on ex post facto grounds.

The Attorney General concedes that if the trial court included the construction penalty or the DNA penalty, the same would be unauthorized. The Attorney General disagrees, however, that the surcharge was unauthorized, asserting that defendant's offense was committed on November 1, 2002, after the September 30, 2002, effective date of Penal Code section 1465.7. The Attorney General requests that the matter be remanded to allow the trial court to delineate the fee and assessments.

A trial court has a duty to separately delineate all fees, fines, and assessments imposed. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1523.) We agree that remand is required. We assume the Attorney General would agree that the surcharge was unauthorized as well, provided defendant's offense occurred on March 3, 2002, before the effective date of Penal Code section 1465.7.

### III

Finally, defendant contends that the abstract of judgment fails to reflect the fees, fines, and assessments imposed. The Attorney General agrees.

On remand, the trial court will have an opportunity to fulfill its duty to separately delineate the fees, fines, and assessments imposed and to amend the abstract of judgment accordingly.



### DISPOSITION

The matter is remanded to the trial court for the limited purpose of orally delineating the fees, fines, and assessments imposed. The trial court is directed to prepare an amended abstract of judgment to reflect the itemization and to forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

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RAYE, J.

I concur:

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MORRISON, J.

I concur in parts II and III of the opinion. With respect to part I, I concur in the result.

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SIMS, Acting P.J.